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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. RUSHAWN LAMONT GIBSON Defendant and Appellant.	B287800 (Los Angeles County Super. Ct. No. TA142025)

APPEAL from a judgment of the Superior Court of Los Angeles County. Pat Connolly, Judge. Affirmed.

Lenore De Vita, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Paul M. Roadarmel, Jr. and David F. Glassman, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Rushawn Lamont Gibson (defendant) appeals from the judgment entered after he was convicted of kidnapping on a plea of no contest. He contends that his decision to enter the plea was the result of ineffective assistance of counsel, and that the trial court abused its discretion in denying his motion to withdraw the plea. Defendant also contends that the case should be remanded for a determination by the trial court of his ability to pay a restitution fine and court fees. We find no merit to defendant's contentions, and thus affirm the judgment.

BACKGROUND

In an amended information, defendant was charged with carjacking, in violation of Penal Code section 215, subdivision (a)[1] (count 1); assault by means likely to produce great bodily injury, in violation of section 245, subdivision (a)(4) (count 3); battery with serious bodily injury, in violation of section 243, subdivision (d) (count 4); kidnapping, in violation of section 207, subdivision (a) (count 5); and kidnapping for carjacking, in violation of section 209.5, subdivision (a) (count 6).[2] It was further alleged that defendant personally used a firearm in the commission of the offense, within the meaning of section 12022. 5, subdivision (a) (counts 3 & 4); that defendant personally used a handgun within the meaning of section 12022.53, subdivision (b) (counts 5 & 6); and that defendant inflicted great bodily injury on the victim within the meaning of section 12022.7, subdivision (a). A prior

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[1] All further statutory references are to the Penal Code, unless otherwise indicated.

[2] Count 2 is was dismissed on defense motion after the preliminary hearing.

serious or violent felony conviction was alleged under sections 1170.12, subdivision (b), and 667, subdivisions (b)-(j) (the Three Strikes law), as well as under 667, subdivision (a)(1), and within the meaning of sections 667.5, subdivision (b).

On January 3, 2018, the date set for trial, defendant entered into a plea agreement whereby he pled no contest to the kidnapping charge (count 5), and admitted the prior conviction allegations, in exchange for a sentence of 20 years in prison. Two weeks later, defendant expressed his desire to withdraw his plea and to relieve defense counsel. Both motions were denied, and on January 26, 2018, the trial court sentenced defendant to the agreed upon 20 years in prison, comprised of eight years, doubled, plus a four-year great bodily injury enhancement and a one-year prior prison term enhancement. Defendant was also ordered to pay a restitution fine of $1,000 pursuant to section 1202.4, subdivision (b), a $40 court operations assessment pursuant to section 1465.8, subdivision (a)(1), and a $30 court facilities assessment pursuant to Government Code section 70373. Defendant was given presentence custody credit of a combined total of 338 days. The trial court issued a certificate of probable cause and defendant filed a timely notice of appeal from the judgment.

Preliminary hearing testimony

Jennifer Nicole Ferrell (Ferrell) testified that she and defendant had been friends for several months by December 9, 2016, when she, defendant, and others were staying at a hotel on Long Beach Boulevard. The previous day she rented a car in her name, using her credit card and driver's license. Defendant contributed to the rental fee by giving Ferrell $150 in cash. Ferrell claimed she was at the hotel on December 9 during her

lunch break, and intended to drive defendant to the train station on her way back to work. In the parking lot on the way to the car, defendant said he wanted to use the car on his own without her. Ferrell refused because defendant did not have a driver's license, the car was in her name, and she was uncomfortable letting him drive by himself. Ferrell then got into the driver's seat, defendant into the passenger seat, and the discussion continued.

Defendant became upset, yelled at her saying she was ruining all his plans for the weekend and called her a bitch. Ferrell continued to refuse, and offered to return the car, get defendant's money back, and part ways. Ferrell testified that defendant became more upset, called her names, said she was not going to do that, that she was going to listen to him. Ferrell continued: "[A]nd then he got out of the car, pulled me across -- we turned right on Haneker (phonetic) and he pulled me through the car, got into the driver's seat."

In confusing narrative testimony, Ferrell claimed alternately that defendant drove to "Haneker," and then she pulled the car over on Haneker, where defendant pulled her over to the passenger seat. "He pulled my hair over. The upper part of my body actually came out of the car, so I had to drag my feet over and sit down correctly in the seat." Ferrell claimed that when defendant got into the driver's seat she saw he had a gun behind his waist. Defendant then drove at about 80 miles per hour on a residential street; hit her four or five times on her left cheek with his right hand as he drove with the gun in his left hand and his knee on the steering wheel. Defendant told her that she was going to learn to listen to him, that he was "not no weak ass nigga," and that he was from Black P Stones. He

repeated, "Do you understand me," until she responded affirmatively.

Ferrell's face hurt and her nose was bleeding. Crying, she told defendant she needed to return to work, to let her out, take the car, and do whatever he wanted. He refused, saying she was not getting out or going to work. He turned left on Haneker, approximately one block from Alondra Boulevard. While stopped for a red light Ferrell jumped out of the car. Defendant then turned right on Alondra Boulevard. A man at a nearby gas station called 911. Ferrell was taken to the hospital, where her nose was stitched and a CT scan taken. She later learned that her nose was fractured and would require surgery. A tooth was cracked in half, and later extracted and replaced with a bridge. Her eye was bruised and swollen for two weeks.

Ferrell's interviews in December 2017

On December 21, 2017, two weeks before defendant's no contest plea, Ferrell was interviewed by a defense investigator in the presence of the prosecutor. She said she rented the car for the benefit of defendant and his friend Angel, as well as for her own benefit. The evening of the day she rented the car, defendant drove crazily, including a road-rage-incident with another man, which made her uncomfortable. Upon their return to the hotel room about 3:00 a.m., defendant fell asleep while she got ready for work. When it was time to leave for work, she woke defendant, told him she was going to take the car. He said no, that he would drop her off and take the car.

Defendant was late picking her up for her lunch break, leaving her no chance to eat, and thus irritated. Ferrell told defendant that she was uncomfortable with the situation, worried that he was going to crash the car, and wanted to return the car

and get the money back. Defendant seemed upset by this and left to go to the store. Still upset when he returned, Ferrell stepped out of the hotel room to be in a more public place. "So then we, I get in the car, . . . I'm driving, or he was driving and we turned, we go out of the apartment and maybe like up one light and he doesn't even want to let me out of the car anymore. So he's fighting me, he has a gun in his hand . . . but his palm, hand is steering the wheel, he's going down the street like [60] miles an hour [in] a residential area. So, and hitting me over here with his right hand. So . . . when he finally stops the car, he drags me out the car. . . . I go to the driver's seat and we drove off and, or I don't even know if I was driving cause I had to jump out of the car in front of Chevron, cause he didn't want to let me out the car."

Ferrell denied that the gun in the car belonged to her, and insisted that it was defendant's gun. "I'm sure they would fingerprint the gun, right, and my fingerprint or DNA is never going to come across that gun. . . . I've never touched it." She said she had seen it at defendant's mother's house, and on the day of the incident, she saw it in the driver's door panel. A bit later in the interview, Ferrell said that she had not really seen the gun but knew that defendant had one.

A week later, on December 28, 2017, Ferrell was interviewed by Detective Taralyn Avila, who summarized the unrecorded statement in a supplemental report. Detective Avila reported that she met Ferrell at the hotel and asked her to guide the detective through the route that Ferrell and defendant drove during the incident. Ferrell said defendant was driving the rental car when they left the hotel, and that she had lied about driving because she feared she would get in trouble, as she was

the only person who was supposed to be driving the car. Ferrell said she lied when she said defendant pulled her out of the driver's seat, because she was concerned that the rental company would find out she was not driving. Ferrell claimed to have been completely honest about everything else she reported occurred during the incident. Ferrell explained that after traveling approximately 60 or 70 miles per hour, defendant slowed the car down as though intending to park, and then physically assaulted her while driving.

The court's advisements and defendant's no contest plea

On the morning of the day set for trial, January 3, 2018, the trial court discussed settlement with defendant and counsel. The court advised defendant that if convicted on the charges, he was facing a sentence of "life plus a lot of years." The court explained: "You've got a gun allegation. You've got a life charge. You've got a strike prior. You've got a five year prior. So there's a lot of time that's hanging over your head. All right. And I know you are well aware of that." Defendant replied, "Yes." The court then stated for the record that the prosecutor had advised the court about the evidence they had, and defense counsel had disclosed the impeachment evidence to be presented, and the court had concluded that both sides faced risks. The court referred to a cell phone video as providing impeachment of the victim's testimony. In addition, the court spoke of the recent reports in which Ferrell admitted having lied. The court further explained that having lied is not always enough to discredit a witness, that juries may believe parts of the witness's testimony and reject others, and that the court had often seen juries do so.

The court also noted that defendant's flight to Texas could possibly be presented as evidence of his consciousness of guilt.[3]

That afternoon, the two-minute cell phone video was played in court in normal time and then in slow motion. Although the recording is not part of the record on appeal, defense counsel and the court explained that it showed Ferrell with a gun in her right hand and what appears to be a gun magazine or a phone in her left hand. Defense counsel represented that the video was recorded the night before the alleged crime.

After a recess to allow defendant to confer with counsel and the attorneys an opportunity to confer, the prosecutor offered a disposition in which defendant would plead to simple kidnapping, admit the prior strike conviction, the prior prison term, and the great bodily injury allegation, and be sentenced to 20 years in prison, one year less than the previous offer. After additional discussion during which the court explained the breakdown of the 20-year term, defendant said that he would take the deal, but protested he did not kidnap the victim. The court informed defendant that it was his decision, and that if he did not want to take the offer, they would begin trial. A voice from the audience identified by the court as defendant's mother, said, "Baby, take this, please." Defense counsel said to defendant, "Do you want it or not? You have the right to a trial. If you want a trial, he will give you a fair trial. Please make a decision." After a pause, defense counsel asked, "What do you want to do?" The court then said, "you need to make this decision and you need to make it now, otherwise I'm going to be making it and we're going to be

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[3] Defendant posted bail, absconded after the preliminary hearing and fled to Texas. He was returned after nearly five months.

going to trial." After another pause, defendant said, "I'll take the deal, man."

The trial court then advised defendant of his right to a jury trial and other constitutional rights, which defendant stated he understood and waived. The court informed defendant of other potential consequences of his plea, including penal consequences, the payment of victim restitution to be determined, fines and fees, and the effect of the conviction on any future prosecution. Defendant stated he understood, entered the plea and admissions, and was sentenced as agreed.

Two weeks later defendant's privately retained defense counsel informed the court that defendant wished to withdraw his plea and to relieve defense counsel. The court held an in camera *Marsden* hearing,[4] and asked defendant why he wished to relieve counsel. Defendant replied that his attorney had failed to provide the prosecutor with the interview transcripts in a timely manner; that on January 12, defendant had learned of additional statements from the victim; and that the prosecutor was still pursuing the carjacking charge without grounds, as the victim had perjured herself in that regard. Defendant stated, "[I]n addition, your Honor, [defense counsel] chose to go off the record to remind me of the double life sentence I was facing. Me being as emotional as I was, I feel these allegations really persuaded me to take a plea for the maximum kidnapping charge that I feel I had a chance to win in a trial with 12 jurors." Defendant offered into evidence the transcripts of Ferrell's interviews with the investigator and the detective (summarized above), and the court admitted them as exhibits A

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[4] See *People v. Marsden* (1970) 2 Cal.3d 118.

and B. Defendant also told the court that he had learned that when she was treated after the incident, Ferrell said to the doctor that defendant had told her to get out of the car.

The court noted that counsel and the court were aware of the transcripts when discussing the offer. Defense counsel added that he discovered Ferrell's medical file late, and had informed defendant only a few days earlier about Ferrell's statement to the doctor, which could possibly contradict the claim that she was being held against her will. Counsel stated: "And I have mixed feelings, to be honest with you. That kidnapping -- that double life term, I did press him real hard about that, and I can understand why, after he thought about it, he felt that he should have gone to trial on that count, with the fact that she perjured herself at the preliminary hearing about him using force to take the car. So I do feel like I dropped the ball there."

The court disagreed and stated that "[t]he perjury was not as to whether or not he was allowed to drive the car at that time . . . [a]nd the perjury was that he had been allowed to drive the car previously." The court agreed that the medical file and the gun evidence provided impeachment, but the court did not perceive that defense counsel had pushed hard, and noted that the court had spoken to defendant several times at great length. Also noting that defendant was emotional and he had family there who told him to take the deal, the court denied the *Marsden* motion.

After the in camera hearing concluded, defendant requested he be permitted to withdraw his plea, based on the claim that Ferrell committed perjury as shown by the transcripts in evidence, as well as the medical records, which he offered into evidence.

The trial court found that the medical file was not inconsistent with what defendant knew at the time of his plea. The court also noted that although defendant used the term, "double life," to describe what he thought his risk was if he went to trial, he was informed that at the very least, if he was convicted of count 6, he could be sentenced to life in prison plus 18 years. Upon finding that defendant was aware of the victim's inconsistent statements when he entered his plea, the court denied the motion.

DISCUSSION

I. Denial of motion to withdraw plea

Defendant contends that the trial court's denial of his motion to withdraw his plea was an abuse of discretion, because he demonstrated with clear and convincing evidence, that his plea was the result of counsel errors and erroneous advice.

"At any time before judgment . . . a trial court may permit a defendant to withdraw a guilty plea for 'good cause shown.' (§ 1018.) 'Mistake, ignorance or any other factor overcoming the exercise of free judgment is good cause for withdrawal of a guilty plea' under section 1018 [citation], and section 1018 states that its provisions 'shall be liberally construed . . . to promote justice.' A defendant seeking to withdraw a guilty plea on grounds of mistake or ignorance must present clear and convincing evidence in support of the claim. [Citation.]" (*People v. Patterson* (2017) 2 Cal.5th 885, 894.) "The defendant must also show prejudice in that he or she would not have accepted the plea bargain had it not been for the mistake. [Citation.]" (*People v. Breslin* (2012) 205 Cal.App.4th 1409, 1416 (*Breslin*).)

"On appeal, the trial court's decision will be upheld unless there is a clear showing of abuse of discretion. [Citations.] An

abuse of discretion is found if the court exercises discretion in an arbitrary, capricious or patently absurd manner resulting in a manifest miscarriage of justice. [Citation.]" (*People v. Shaw* (1998) 64 Cal.App.4th 492, 495-496.) "'Moreover, a reviewing court must adopt the trial court's factual findings if substantial evidence supports them.' [Citation.]" (*Breslin supra*, 205 Cal.App.4th at p. 1416.)

The two-part test of *Strickland v. Washington* (1984) 466 U.S. 668 applies to claims that a guilty plea was entered due to the erroneous advice of counsel. (*Hill v. Lockhart* (1985) 474 U.S. 52, 58 (*Hill*); *Breslin*, *supra*, 205 Cal.App.4th at p. 1418.) Thus, "'the defendant must show that counsel's representation fell below an objective standard of reasonableness [and] that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' [Citation.]" (*Hill*, at pp. 57-58.)

Defendant alleges three counsel errors: misinforming defendant about the potential sentence if convicted of count 6; failure to inform defendant of the medical triage note prior to his plea; and failure to correct the trial court's erroneous characterization of the impeachment evidence that it went to whether or not defendant had permission to drive the car prior to the incident giving rise to the charges.

First, defendant has failed to show either that counsel misinformed him about the potential sentence if convicted of count 6, or that defendant did not understand the potential sentence. Defendant contends that counsel's use of the term "double life" was erroneous, and any competent attorney would have known that when a life term is subject to being doubled due to a prior strike conviction, the sentenced is not two life terms,

but rather, the minimum parole eligibility period is doubled. (See § 667, subd. (e)(1).) The minimum parole eligibility period for an indeterminate life sentence is seven years; thus double it is 14 years. (See § 3046, subd. (a)(1).)

Defendant acknowledges that defense counsel's explanation of "double life" was made off the record. Courts "have repeatedly stressed 'that "[if] the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged[,] . . . unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation," the claim on appeal must be rejected.' [Citations.]" (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266.) Here, the record is silent as to why defense counsel referred to the potential sentence as "double life." It could well have been merely jargon or shorthand for doubling the minimum parole eligibility period, and he may have made this clear to defendant in their private discussions. Defendant does not claim otherwise; nor does he claim that he did not understand what counsel meant by "double life." Furthermore the trial court explained to defendant that the potential sentence was life plus a lot of years, and in denying the motion to withdraw the plea, the court found that defendant was told he would have received 14 years plus enhancements. The record does not demonstrate otherwise.

Second, defendant has failed to demonstrate that the tardy disclosure of the medical triage note fell below an *objective* standard of reasonableness under prevailing professional norms. He *assumes* that it did, because defense counsel expressed his opinion during the *Marsden* hearing that he had "dropped the ball" by failing tell defendant about the note before defendant entered his plea.

"'Attorney errors come in an infinite variety and [cannot] be defined with sufficient precision to inform defense attorneys correctly just what conduct to avoid. . . . Even if a defendant shows that particular errors of counsel were unreasonable, therefore, the defendant must show that they actually had an adverse effect on the defense.' [Citation.]" (*Hill, supra*, 474 U.S. at pp. 57-58.) In the context of a guilty plea, "in order to satisfy the 'prejudice' requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." (*Id*. at p. 59, fn. omitted.)

Defendant did not submit a declaration, testimony, or other evidence showing that he would have gone to trial if he had known of the triage note or if counsel had not used the phrase, "double life." Instead defendant claims this was shown during the *Marsden* hearing "because he said, several times on the record, that he would not have entered into the plea had he been otherwise advised." In support, defendant refers to three pages in the hearing transcript on which there are no statements by defendant at all. He refers to two other pages in the hearing transcript where defendant stated reasons why he was unhappy with defense counsel, but made no statement to the effect that he would not have entered into the plea agreement if he had been otherwise advised. Moreover, defendant based his unhappiness with counsel not only on the medical file contents, but also on the facts and issues he was aware of prior to entering his plea. Specifically, the victim's perjury, defendant's emotional state, and counsel's off-the-record explanation of "the double life sentence." "[T]hese allegations really persuaded me to take a plea for the maximum kidnapping charge that I feel I had a chance to win in

a trial with 12 jurors." Defendant explained, "[A]nd because [the prosecutor] was still charging me with that, before I go to trial, he kind of persuaded me to take the deal. But, you know, I thought about it, and he didn't have no grounds, because of her perjuring herself." While these statements expressed both defendant's unhappiness with counsel and his second thoughts about his plea due to the medical triage note *plus* all the facts he knew at the time of his plea, they do not include a statement that he would have gone to trial if he had known about the notation in the medical file or any erroneous advisement by counsel. "'A plea may not be withdrawn simply because the defendant has changed his . . . mind.' [Citation.]" (*Breslin, supra*, 205 Cal.App.4th at p. 1416.)

We note that at the hearing on the motion to withdraw plea, defense counsel argued: "[Defendant's] will was overborne by the double life sentence threat, and I feel that the District Attorney should have dismissed the carjacking and the kidnapping for carjacking. And by keeping those and making [defendant] go to trial on those, it would form a coercion, to get a plea. *Without those counts* he would have gone to trial." (Italics added.) This is a far cry from claiming that defendant would not have taken the plea but instead would have gone to trial on the charges.

"In many guilty plea cases, the 'prejudice' inquiry will closely resemble the inquiry engaged in by courts reviewing ineffective-assistance challenges to convictions obtained through a trial. For example, where the alleged error of counsel is a failure to investigate or discover potentially exculpatory evidence, the determination whether the error 'prejudiced' the defendant by causing him to plead guilty rather than go to trial will depend

on the likelihood that discovery of the evidence would have led counsel to change his recommendation as to the plea. This assessment, in turn, will depend in large part on a prediction whether the evidence likely would have changed the outcome of a trial. Similarly, where the alleged error of counsel is a failure to advise the defendant of a potential affirmative defense to the crime charged, the resolution of the 'prejudice' inquiry will depend largely on whether the affirmative defense likely would have succeeded at trial. [Citation.]" (*Hill*, *supra*, 474 U.S. at p. 59.)

Defense counsel never claimed that he would have changed his recommendation if he had found the triage note in the medical file prior to defendant's plea. Counsel merely argued "that the kidnapping, the double life terms, are on a very shaky basis, if we went to trial. And I believe *[defendant] feels*, with *second thoughts*, he should have gone to trial on those counts, and that he could have proven those counts." (Italics added.) Although defense counsel indicated at the hearing on the motion to withdraw plea that because defendant contributed to the rental fee, he had a claim-of-right defense to carjacking, that assertion was not supported by any legal argument, and defendant does not repeat or develop the assertion here.

Finally, defendant has not shown that the trial court's mistaken characterization of the impeachment evidence at the *Marsden* hearing had any effect on its exercise of discretion in denying the motion to withdraw plea, as he argues here. Defendant asserts that if defense counsel had corrected the misunderstanding, "it is likely the trial court would have viewed the newly revealed impeachment in a more favorable light," because "[Ferrell]'s admission that [defendant told] her to 'get out

of the car' was an unambiguous declaration." On the contrary, only defendant's hyperbolic paraphrasing is unambiguous. Defendant has not shown that the triage note likely would have helped the defense at trial. Indeed, defendant makes no effort to show that the note made by a triage nurse would even be admissible. And as the trial court said, "[C]ontext is everything, timing is everything, as to whether that statement was made, if it was made at all."

In sum, as the record does not show that defense counsel's use of the term "double life" was error or that it misled defendant, and defendant has not shown that absent his ignorance of the medical triage note he would have gone to trial, defendant did not meet his burden below and does not demonstrate here an abuse of discretion in denying the motion.

II. Imposition of restitution fine and court fees

In supplemental briefing, defendant contends that he is indigent,[5] and asks that we vacate the $40 court operations assessment imposed pursuant to section 1465.8, subdivision (a)(1), as well as a $30 court facilities assessment imposed pursuant to Government Code section 70373. Defendant also asks that we order the trial court to stay the $1,000 restitution fine that it imposed pursuant to section 1202.4, until such time as the People prove his ability to pay.

Defendant relies on *People v. Duenas* (2019) 30 Cal.App.5th 1157 (*Duenas*), in which Division Seven of this court held that constitutional considerations of due process and equal protection

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[5] Defendant fails to cite evidence in the record to support his statement that he is indigent, and we observe that defendant retained private counsel, who represented him throughout trial and sentencing.

required reading into Government Code section 70373 and Penal Code section 1465.8 a procedure for obtaining a waiver of the assessments on the ground of inability to pay. (*Duenas*, at pp. 1164-1169, 1172 & fn. 10.) In addition, the *Duenas* court also held that although section 1202.4, subdivision (c) provides for considering the defendant's ability to pay a restitution fine in excess of the minimum fine called for under section 1202.4, subdivision (b)(1), due process required a consideration of the defendant's inability to pay even when only the minimum fine is imposed. (*Duenas*, at pp. 1164, 1169-1170, 1172 & fn. 10.) The court concluded that the trial court erred in refusing to consider the defendant's ability to pay the fine and assessments. (*Id*. at p. 1172 & fn. 10.)

Here, respondent contends that defendant has forfeited any claim that the trial court's imposition of assessments and the restitution fine violated due process, as he did not claim an inability to pay at sentencing or request a hearing in the trial court. Defendant argues that his failure to object should be excused because the law at the time he was sentenced was not in his favor and *Duenas*, which was not decided until after he was sentenced, represented a dramatic and unforeseen change in the law governing assessments and restitution fines. In *People v. Castellano* (2019) 33 Cal.App.5th 485 (*Castellano*), it was explained that the holding in *Duenas* represented a newly announced constitutional principle, and declined to apply the rule of forfeiture to a defendant who had not objected to assessments or the imposition of the minimum restitution fine ($300). (*Castellano*, at p. 489.)

We need not resolve any constitutional issue here. Section 1202.4, subdivision (c) expressly permits a defendant to assert in

the trial court an inability to pay a restitution fine imposed above the statutory minimum, and the statute so permitted prior to the *Duenas* and *Castellano* decisions.[6] (See *People v. Bipialaka* (Apr. 17, 2019, B285656) __ Cal.App.5th __ [2019 Cal.App. LEXIS 355]; *People v. Frandsen* (2019) 33 Cal.App.5th 1126, 1153-1154.) It is the defendant's burden to demonstrate his inability to pay. (§ 1204.4, subd. (d).) In *Duenas*, the defendant had already established with undisputed evidence that she was unable to pay court fees and fines. (See *Duenas, supra*, 30 Cal.App.5th at p. 1166 & fn. 2.) We thus do not read the court's order staying the fine until and unless the prosecution proved ability to pay to have abrogated the defendant's initial burden. As a defendant is the most knowledgeable person regarding his or her ability to pay a fine, it is incumbent upon him or her to at least raise the issue and make a prima facie showing. (*Frandsen*, at p. 1154; see *People v. McMahan* (1992) 3 Cal.App.4th 740, 749-750.)

Here, the trial court imposed a restitution fine of $1,000, which was $700 in excess of the statutory minimum. Defendant asked the court to waive the fees, claiming he was indigent, but did not make an offer of proof, submit evidence, or request a

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6 At the time of defendant's sentencing, as now, section 1202.4, subdivision (d) provides in relevant part: "In setting the amount of the fine pursuant to subdivision (b) in excess of the minimum fine pursuant to paragraph (1) of subdivision (b), the court shall consider any relevant factors, including, but not limited to, the defendant's inability to pay . . . . Consideration of a defendant's inability to pay may include his or her future earning capacity. A defendant shall bear the burden of demonstrating his or her inability to pay." (§ 1204.4, subd. (d); Stats. 2017, ch. 101, § 1.)

hearing. Under such circumstances, defendant failed to preserve his appellate challenge to the restitution fine, and we presume that he has the ability to pay it. (See *People v. Avila* (2009) 46 Cal.4th 680, 729.)

Moreover, we can infer that defendant has an ability to pay both the restitution fine and the assessments from probable future wages, including prison wages. (See *People v. Douglas* (1995) 39 Cal.App.4th 1385, 1397, citing *People v. Gentry* (1994) 28 Cal.App.4th 1374, 1376-1377.) Prison wages range from a minimum of $12 per month to $56 per month depending on the prisoner's skill level. (Cal. Code Regs., tit. 15, § 3041.2.) The Department of Corrections and Rehabilitation may garnish between 20 and 50 percent of those wages to pay a prisoner's restitution fine. (Pen. Code, § 2085.5, subd. (a); *People v. Ellis* (2019) 31 Cal.App.5th 1090, 1094.) Defendant was sentenced when he was 34 years old to a 20-year term, with almost one year of presentence custody credit. Even assuming that defendant earns no more than a minimum prison wage, he should be able to pay the restitution fine plus the $70 in assessments during his incarceration. If not, he will be just over 50 years old when released, and there is no reason to believe that he will not be able to earn enough to pay whatever is then left. The circumstances lead us to conclude beyond a reasonable doubt that remand would not produce a different result, and we decline to order such an exercise in futility. (Cf. *People v. Bennett* (1981) 128 Cal.App.3d 354, 359-360 [remand for resentencing unnecessary where "the result is a foregone conclusion"].)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
CHAVEZ

We concur:

_____, P. J.
LUI

_____, J.
ASHMANN-GERST